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In the Supreme Court of the United States

OCTOBER TERM, 1956

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

PREMIER PEAT MOSS CORPORATION, ET AL., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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MAY 1957.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 147 F. Supp. 169, and is set forth in Appendix A to this statement. The decision of the Interstate Commerce Commission is reported at 66 M. C. C. 105.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside certain orders of the Interstate Commerce Commission insofar as such orders find and conclude that peat moss is not embraced by the term "agricultural commodities" as that term is used in section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303

(b) (6)). The judgment of the district court is dated January 8, 1957, and was entered on January 21, 1957. The Commission's notice of appeal was filed in the district court on March 20, 1957.

The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U. S. 49; *Frozen Food Express* v. *United States*, 351 U. S. 40; *American Trucking Associations* v. *United States*, 344 U. S. 298.

STATUTES INVOLVED

Sections 203 (b) (6) and 209 (a) (1) of the Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 49 U. S. C. 303 (b) (6) and 309 (a) (1), provide in pertinent part:

> SEC. 203 (b) Nothing in this part except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *.
>
> SEC. 209 (a) (1) Except as otherwise provided in this section and in section 210 (a), no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or

within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business * * *.

QUESTION PRESENTED

Whether the district court erred in holding, contrary to the Interstate Commerce Commission, that peat moss is embraced by the term "agricultural commodities" as that term is used in section 203 (b) (6) of the Interstate Commerce Act, 49 U. S. C. 303 (b) (6).

STATEMENT

In 1953, nine motor carriers filed with the Commission applications, pursuant to section 209 of the Interstate Commerce Act, for permits to transport as contract carriers peat moss, ground or not ground, from New York and New Jersey piers in New York Harbor to points and places in New York, New Jersey, and Connecticut within 150 miles of New York City. The applicants moved for dismissal of the applications on the ground that peat moss is an agricultural commodity within the exemption of section 203 (b) (6) of the Act, and sought permits only in the event this contention was rejected. Intervening shippers of peat moss supported the applicants and, without formally intervening, the Secretary of Agriculture filed a brief contending that peat moss is an agricultural commodity. A number of motor carriers, motor carrier associations, and rail carriers intervened in opposition.

After a joint hearing on the nine applications, the examiner filed a report recommending that the Commission find that peat moss is an agricultural commodity and deny the applications. Thereafter, on December 9, 1955, the Commission, by Division 1, issued its report (66 M. C. C. 105), concluding that peat moss is not an agricultural commodity within the meaning of section 203 (b) (6), that authority is required for its interstate transportation, and that appropriate permits should be granted to applicants. Petitions for reconsideration were denied on April 10, 1956, by order of the entire Commission.

On June 1, 1956, this suit was filed by shippers of peat, some of which were intervenors before the Commission. As the court noted in its opinion (147 F. Supp. at 171), there is no dispute between the parties as to the facts; the sole question on the merits being whether the Commission's conclusion that peat moss is not an agricultural commodity within the meaning of section 203 (b) (6) is permissible. The uncontroverted findings of the Commission respecting the origin, physical properties, uses, and marketing of peat moss are set out in its report as follows (66 M. C. C. at 108, 109):

> Peat moss is composed of plants which were recently growing, or which grew many years ago, such as sphagnum moss, reeds, ferns, certain types of trees, other plants, or, in some cases, a mixture of these materials. This vegetation after being grown on the land, has ceased to live, and has undergone partial decomposition. Deposits are accumulated under water or in places waterlogged most of the

time. Organic matter decomposes very slowly under water. Thus the remains of vegetation growing in water, or falling into it tend to accumulate more rapidly than they decompose, until the accumulation of deposits is exposed to the air at the surface. From then on decomposition of the organic matter keeps pace with its accumulation. As the level of the bog is raised, new types of vegetation appear in response to the changing environment. At the site of a bog there usually is found on top various plants growing and living and sending their roots into the bog. When these plants die their seeds remain, and the dead plants enter into the process of decay, as did plants hundreds of years before them. When the dead matter is covered with water the decomposition is arrested. This process continues year after year for hundreds of years, and tends to build up a deposit of considerable depth. Therefore, at a bog there will be found living matter growing on top; immediately below, matter that was alive a short time ago; and at successively lower depths, matter which has been dead for longer and longer periods. If trees have formed a large portion of the deposit it is known as woody peat, while if the deposit is comprised chiefly of sphagnum moss the result is a very fine, soft sphagnum-type peat moss. The latter type is usually selected for the commercial trade, and is the type here under consideration. Peat moss is used primarily for soil improvement, as a fertilizer conditioner, as bedding for horses and cattle, and as poultry litter. To a limited extent, it is also used for packing plants, cut flowers,

and certain vegetables for shipments to market, and for other purposes. In 1950, for example, of approximately 256,000 tons produced in this country or imported, approximately 161,000 tons were used for soil improvement, 56,000 tons for fertilizer filler, 31,000 tons for poultry litter and stable bedding, and 8,000 tons for all other uses. All of the peat moss involved is imported, principally from Germany, but to some extent from Canada.

In harvesting peat moss, a usual preliminary step consists in draining at least the part of the bog selected for immediate use. Spadelike implements are used for cutting and removing peat moss in blocks. The blocks, often about 8 by 16 inches' surface measurement and cut to a depth of about 8 inches, are sometimes placed in ricks, or stacks to drain and to dry. A more rapid method of drying involves stacking the blocks on wooden frames. When handled in this way the blocks may be air dried in 2 or 3 weeks, while a whole season is often required for drying peat moss in ricks. After drying, the blocks are taken to a storage house, usually a shedlike structure, where they are shredded, baled, and made ready for shipment. The shredding devices are usually modifications of grain-threshing equipment. Pegs, which take the place of the concaves in a thresher, are set against springs to take care of lumps too hard for shredding. Sometimes roots and other coarse particles are removed during the shredding process. Very coarse sieves, perhaps of 3/8-inch mesh, may be used to separate the large pieces or aggregates not suitable for marketing. The peat moss is then

compressed into bales approximately 7.5 cubic feet and 3.5 cubic feet in size. The larger sized bales predominate in the shipments handled by applicants.

The court found unpersuasive the reasons advanced by the Commission in support of its determination that peat moss is not an agricultural commodity, and concluded that the Commission exceeded the limits placed upon its statutory powers in excluding the interstate transportation of peat moss from the exemption.

THE QUESTION IS SUBSTANTIAL

Unlike *East Texas Motor Freight Lines* v. *Frozen Food Express* 351 U. S. 49, the question here is not whether a commodity once concededly agricultural has been so processed as to become a manufactured product. Rather, it is whether peat moss should be classified as an agricultural commodity at all.

In *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 519, after an extensive investigation to determine the meaning and scope of the terms "agricultural commodities" and "manufactured products thereof," the Commission concluded that "the term 'agricultural commodities' as used in section 203 (b) (6) embraces all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey)." That this definition is an entirely reasonable and, indeed,

broad construction of the term is apparent from a perusal of the dictionary definitions considered by the Commission and set out in the report (52 M. C. C. at 517–518).[1]

In concluding in the instant case that peat moss should not be classified as an agricultural commodity, the Commission pointed out that it does not come within the above definition and said (66 M. C. C. at 109):

> * * * It is not a commodity raised or produced on the farm by tillage and cultivation of the soil. And aside from this, it is not in the nature of a crop which once having commenced growth in the air or water, can be harvested within any period capable of reasonable forecast by living man. * * *

We submit that this conclusion is reasonable and that it was error for the district court to reverse.

Peat moss is composed of vegetation which has long since ceased to live and has undergone partial decomposition. It accumulates under water in bogs

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[1] More recently, Webster's New International Dictionary (2nd Ed., 1956) defines "agricultural" and "agriculture" as follows:

"Agricultural. Of, pertaining to, or dealing with agriculture; * * *.

"Agriculture. The art or science of cultivating the ground, and raising and harvesting crops, often including also feeding, breeding, and management of livestock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise. In this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc."

as the result of a continuous process over a period of hundreds of years. Only under special circumstances may it be ready for digging in as short a period as fifteen or twenty years. "Harvesting" consists in draining the part of the bog selected, cutting and removing the peat in blocks with spadelike implements, and stacking the blocks to dry. After drying the blocks are shredded, baled, and made ready for shipment.

Not a forest product, and in no sense an ordinary farm crop, peat moss is similar in many respects to such obviously nonagricultural products as coal, lignite, and petrified wood.[2] Like them, it is the result of years of conditioning by nature of decayed or partially decomposed vegetable matter which has not been planted for the purpose by man. Like coal and lignite, it is excavated or dug. Basically, coal, lignite, petrified wood, and peat moss are not agricultural for the reason that they are not tilled, cultivated or harvested in the manner of ordinary crops, and they have long been devoid of life. Admittedly, such commodities as wild berries, wild hay, and Spanish moss have been held to be agricultural by the Commission despite the fact that they are not produced by tillage and cultivation. But they are living, growing crops made available by nature's bounty and harvested by farmers as products of the soil.

[2] In the *Standard Industrial Classification Manual, Volume II (1942)*, page 14, prepared by The Technical Committee on Industrial Classification, Division of Statistical Standards under the sponsorship of the Bureau of the Budget, the production of peat is given the same classification as the mining of lignite.

This vital distinction destroys any attempt to draw an analogy between them and the lifeless product of years of decay and decomposition in water-logged areas of once living vegetation that is peat.

Of course, peat moss is widely used on farms and in gardening, but this does not make it an agricultural commodity. It need hardly be stated that the test is not the use to which a commodity is put, else commercial fertilizers and lime must similarly be classed as agricultural although their production takes place far from the farm.

The consumption of peat moss in the United States has steadily increased over the years (Ex. 10) so that today it is a significant item of commerce. For example, in 1950, approximately 256,000 tons of peat moss were used in this country—much of it, and all that is involved in the present case, having been imported from abroad. (66 M. C. C. at 109; Ex. 10.)

This court has recognized that the purpose of Congress in enacting Part II of the Interstate Commerce Act was to promote a healthy system of regulated motor carrier service to serve the entire public. In *American Trucking Associations* v. *United States*, 344 U. S. 298, 312, the Court said:

> * * * Then the industry was unstable economically dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility. * * *

And the Court has held that all of the provisions of the Act must be interpreted so far as possible to further this legislative purpose. As remedial legislation, exemptions from its compass should be construed so as to make effective its dominant purposes.

In substituting its judgment for that of the Commission under these circumstances, the district court acted contrary to fundamental principles of judicial review prescribed by this Court in such cases as *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 129; *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282, 286; and *Interstate Commerce Commission* v. *Northern Pacific R. Co.,* 222 U. S. 541, 547.

Viewed as purely a question of law, we submit that the ultimate finding of the Commission should have been sustained. In *Levinson* v. *Spector Motor Co.,* 330 U. S. 649, 672, the Court pointed out that:

> * * * As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for administration and enforcement of this law, these conclusions are entitled to special consideration. * * *

And see *East Texas Motor Freight Lines* v. *Frozen Food Express,* 351 U. S. 49, 55 (dissenting opinion of Mr. Justice Burton).

CONCLUSION

For the reasons stated, the question presented by this appeal is substantial and of public importance.

Respectfully submitted.

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Washington 25, D. C.

MAY 1957.

APPENDIX A

United States District Court, Southern District of New York

Civil Action No. 110-131

NOVEMBER 8, 1956.

PREMIER PEAT MOSS CORPORATION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Suit by peat moss producers and shippers, brought under 28 U. S. C. A. §§ 1336, 1398, 2284 and 2321–2325, to review, set aside and enjoin certain orders of the Interstate Commerce Commission holding that peat moss is not an agricultural commodity within the meaning of 49 U. S. C. A. § 303 (b) (6).

Mitchell Salem Fisher, Attorney for Plaintiffs.

Victor R. Hansen, Assistant Attorney General, James E. Kilday and James H. Durkin, Attorneys, Department of Justice; Paul W. Williams, United States Attorney, Robert W. Ginnane, General Counsel, and Leo H. Pou, Associate General Counsel, Interstate Commerce Commission, for Defendants.

Bernard Sobol, Robert S. Trigg and Carl Helmetag, Jr., Attorneys for Intervenor Railroads.

Before SWAN, *Circuit Judge*, and WALSH and CASHIN, *District Judges*

SWAN, *Circuit Judge:*

This action is the sequel to proceedings before the Interstate Commerce Commission initiated in 1953 by

applications of motor carriers, pursuant to 49 U. S. C. A. § 309, for permits to transport as contract carriers peat moss, ground or not ground, from New York and New Jersey piers in New York Harbor to points in New York, New Jersey and Connecticut within 150 miles of New York City. The applicants moved for dismissal of their own applications on the ground that peat moss is an agricultural commodity and therefore the transportation of it by contract carriers in interstate commerce is exempted from the permit requirements of § 309 by § 303 (b) (6);[1] they sought permits only in the event of rejection of this contention. The motion was supported by the Secretary of Agriculture, who filed a brief without formally intervening, and by intervening producers and shippers of peat moss, including plaintiffs in the present action. Several Railroads intervened and opposed the motion. The Examiner who heard the case took evidence as to the nature of peat moss, its use, the manner of harvesting it, and the need of shippers for motor carrier transportation. His Report recommended that the Commission should find that peat moss is an agricultural commodity and should dismiss the application for lack of jurisdiction. Division 1 of the Commission accepted the Examiner's findings of fact but ruled that peat moss is not an agricultural commodity within the statutory exemption, and that the applicants were entitled to permits as motor contract carriers. *Marino Trucking Co., Inc., Extension—Peat,* 66 M. C. C. 105. Petitions for reconsid-

[1] 49 U. S. C. A. § 303 (b) declares: "Nothing in this chapter * * * shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish, (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof) * * *."

eration were denied by the Commission on April 10, 1956, and the present suit was filed on June 1st praying that the orders of the Commission be set aside in so far as they conclude that peat moss is not an "agricultural" commodity within the meaning of the statute.

There is no dispute between the parties as to the facts. The merits of the controversy are whether the Commission was correct in ruling that peat moss is not an "agricultural" commodity within 49 U. S. C. A. § 303 (b) (6). But before reaching the merits it is necessary to consider the contention of the defendants and the intervening Railroads that the plaintiffs have no standing to maintain the present suit.

To attack an order of the Commission a plaintiff must show that he has "a legal right or interest which will be injuriously affected by the order."[2] The defendants, whose argument the Railroads also adopt, contend that the orders here involved do not affect any right of the plaintiffs because they do not require the plaintiffs to do or to refrain from doing anything; that all the plaintiffs allege by way of injury is that they will have to pay more for transportation of peat moss by regulated motor carriers than they did before the Commission ruled that peat moss was not an agricultural commodity, which is merely saying that the orders will have an adverse effect on the plaintiffs' economic position; and that this is not enough to give plaintiffs standing to attack the orders, since "They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination."[3] We accept the legal propositions enunciated by the cited authorities but they do not dispose of the case

[2] *Moffat Tunnel League v. United States*, 289 U. S. 113, 119.

[3] *Sprunt & Son v. United States*, 281 U. S. 249, 255.

at bar. Here the question determinative of the shippers' standing to maintain the suit is whether or not the Commission has jurisdiction over motor carriers of peat moss. If it does, such carriers are required to establish and observe reasonable minimum rates and charges for the services rendered, and are prohibited from collecting less than the established minimum rates.[4] Hence the right of shippers to contract for transportation of peat moss is restricted to those motor carriers to whom permits are or may be issued, and the minimum rates payable are fixed by their filed schedules of rates. On the other hand, if the Commission does not have jurisdiction, the plaintiffs are free to get the best bargain they can from a motor carrier. For simplicity of discussion assume that the Commission should make a perfectly arbitrary ruling that tomatoes are not an "agricultural" commodity. Such a plainly erroneous determination would deprive a tomato farmer of the benefits Congress intended to confer by § 303 (b) (6), namely, those flowing from freedom to use unregulated motor carriers.[5] It would thus deprive him of a statutory right and would restrict his common law right to contract for transportation on any terms acceptable to the carriers. The plaintiffs have similar rights which the orders injuriously affect, if the Commission erred in excluding peat moss from the "agricultural" exemption. This is plainly stated in *Frozen Food Express* v. *United States*, 351 U. S. 40. There the plaintiff was a motor carrier transporting numerous commod-

[4] 49 U. S. C. A. § 318 (a).

[5] See *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U. S. 49, 51: "The exemption of motor vehicles carrying 'agricultural (including horticultural) commodities (not including manufactured products thereof)' was designed to preserve for the farmers the advantage of low-cost motor transportation."

ities which the Commission ruled were nonexempt but which the carrier claimed were agricultural commodities. In holding that the complaint presented justiciable issues, the opinion states (pp. 43–44):

> The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The "order" of the Commission is in substance a "declaratory" one, see 60 Stat. 240, 5 U. S. C. § 1004 (d), which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done.

In *Consolidated Truck Service, Inc.* v. *United States*, D. C. N. J., decided September 28, 1936, Judge Biggs' opinion contains a dictum with respect to the rights of shippers, as follows: "If Consolidated does transport them [shelled nuts] it and its shippers will incur the penalties prescribed by the statute, the Commission having prohibited the transportation."[6] This is a further indication of the substantial interest which shippers have in the situation. In our opinion the the plaintiffs have standing to maintain the suit.

On the merits we think the Commission was wrong. Whether the statutory exemption should be construed to cover a product of nature having such physical characteristics as peat moss is a question on which the Commission's determination, although entitled to deference, does not conclude the courts.[7]

The Commission made the following findings:

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[6] See 49 U. S. C. A. § 322 (e).

[7] See *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 54.

Peat moss is composed of plants which were recently growing, or which grew many years ago, such as sphagnum moss, reeds, ferns, certain types of trees, other plants, or, in some cases, a mixture of these materials. This vegetation after being grown on the land, has ceased to live, and has undergone partial decomposition. Deposits are accumulated under water or in places waterlogged most of the time. Organic matter decomposes very slowly under water. * * * Therefore, at a bog there will be found living matter growing on top; immediately below, matter that was alive a short time ago; and at successively lower depths, matter which has been dead for longer and longer periods. If trees have formed a large portion of the deposit it is known as woody peat, while if the deposit is comprised chiefly of sphagnum moss the result is a very fine sphagnum-type peat moss. The latter type is usually selected for the commercial trade, and is the type here under consideration. * * *

In harvesting peat moss, a usual preliminary step consists in draining at least the part of the bog selected for immediate use. Spadelike implements are used for cutting and removing peat moss in blocks. The blocks, often about 8 x 16 inches surface measurement and cut at a depth of about 8 inches, are sometimes placed in ricks, or stacks, to drain and to dry. A more rapid method of drying involves stacking the blocks on wooden frames. When handled in this way the blocks may be air dried in 2 or 3 weeks, while a whole season is often required for drying peat moss in ricks. After drying, the blocks are taken to a storage house, usually a shedlike structure, where they are shredded, baled, and made ready for shipment. The shredding devices are usually modifications of grain-threshing equipment. * * *

The reasons advanced by the Commission for rejecting the Examiner's recommendation that peat moss be held to be an agricultural commodity are stated in a single paragraph of its opinion.[8] They are three: (1) that in an earlier decision the Commission had set forth a definition of "agricultural commodities" which Congress may be considered to have otherwise approved by implication when it adopted the 1952 amendment to include "(horticultural)";[9] (2) that peat moss is not within the earlier definition since it is not produced on a farm by tillage and cultivation of the soil; and (3) that it is not a crop which once having commenced growth in the earth, air or water, can be harvested within any period capable of reasonable forecast by living man.

None of these reasons do we find persuasive. The earlier decision made no mention of peat moss. Nor did its definition of agricultural commodities purport to be all inclusive. It merely lists commodities which it "embraces"; hence there is no implication that all not listed were excluded from the definition. Consequently the suggestion that Congress may be considered to have approved the definition can carry no implication that Congress approved a holding that peat moss was a nonexempt commodity. Moreover, the rationale is contra to *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, where a commodity which had been denominated as nonagricultural in the

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[8] 66 M. C. C. 105, 109.

[9] In the earlier decision, *Determination of Agricultural Commodities*, 52 M. C. C. 511, 519, the Commission concluded that the term agricultural commodities as used in the section "embraces 'all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey).'"

"Determination" case because it was a manufactured product, was held by the Supreme Court to be within the exemption.

The argument that peat moss is not within the definition because it is not produced by cultivation of the soil is likewise unpersuasive. In the earlier decision the Commission itself recognized as within the exemption numerous commodities which are not the result of tillage and cultivation; for example, forest products, wild berries, marsh hay, prairie grass, and Spanish moss.

The third reason advanced, namely, that peat moss is not a crop which can be harvested within any period of reasonable forecast is insufficient to distinguish it from other wild products which are admittedly "agricultural"; for example, long-lived, slow growing trees. Furthermore, there is testimony in the record that under certain conditions peat moss may be ready to harvest within fifteen or twenty years. It is harvested in the summer season, dried in the sun and then processed by cutting and baling. Neither the report of the Commission nor the report of the Examiner contains any finding as to the extent to which peat moss comes from farms. But the record shows it is dug both on land of farmers within the United States and on land of commercial peat moss companies. In some instances, farmers dig it themselves and bring loads of it to a peat moss company plant; in other instances, they may sell it in the ground and it is harvested by personnel of the company. If the essential nature of a commodity is "agricultural," it is irrelevant that at times it is harvested by commercial interests rather than the farmer himself, or that, as in the case at bar, the commodity is imported.

Indubitably peat moss is of vegetable origin. It

is "produced by nature from what was once vegetation, and chemically it is substantially the same as the vegetation from whence it is derived. In fact, its chief characteristic results from the fact that nature itself has arrested any substantial change which without the protection of water would otherwise have taken place. Its principal uses, too, are either agricultural or horticultural." [10]

The defendants urge that peat moss is unlike any commodity produced on a farm and is more in the nature of coal. But in the case of coal, although in origin derived from vegetation, the processes of nature have converted it into a mineral. Not so in the case of peat moss. There the processes of decay have not progressed far enough to cause any substantial change in its original chemical content.

All of the witnesses with expert qualifications, several of whom had also had farm experience, testified that peat moss is commonly regarded as an agricultural commodity. Under the circumstances above recited and in the absence of any evidence in the record which suggests that peat moss may properly be classified in some nonagricultural category, we can see no rational basis for disregarding the uniformity of expert opinion. We think the Commission exceeded the limits placed upon its statutory powers in excluding the interstate transportation of peat moss from the exemption provided by §303 (b) (6).[11] Accordingly, the orders under review must be set aside and an injunction against their enforcement will be granted.

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[10] Quoted from the Examiner's report.

[11] See *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 54.

If findings of fact and conclusions of law, supplementing those contained herein, are desired, the parties may submit proposals therefor within 15 days.

THOMAS A. SWAN,
Circuit Judge.
LAURENCE E. WALSH,
District Judge.
JOHN M. CASHIN,
District Judge.

APPENDIX B

United States District Court, Southern District of New York

PREMIER PEAT MOSS CORPORATION, GELLCO, INC., GARDEN SUPPLY SALES CORPORATION, LEWIS INTERNATIONAL COMPANY, NEW AMSTERDAM IMPORT CO. INC., ATKINS & DURBROW CONN. CORP., BRUCO PEAT MOSS CORPORATION, ASCOT PEAT MOSS CORP., CONRAD FAFARD, INC., EZL. DUNWOODY CO., I. H. NESTER & CO., J. M. TRADING CORP., EDMOND J. LANG, NATIONAL DISTRIBUTORS, INC., and THE PEAT MOSS ASSOCIATION, INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, ERIE RAILROAD, LEHIGH VALLEY RAILROAD COMPANY, NEW YORK CENTRAL SYSTEM, THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and READING COMPANY, INTERVENORS

DECREE

Before Thomas W. Swan, Circuit Judge, Lawrence E. Walsh, District Judge and John M. Cashin, District Judge, being the statutory three-judge Court convened herein pursuant to the provisions of Title 28, Section 2284 of the United States Code.

This cause came on to be heard on the 3rd day of October 1956, at the U. S. Court House for the South-

ern District of New York, Foley Square, Borough of Manhattan, City and State of New York, and was argued by counsel for the plaintiffs, counsel for the defendants, and counsel for the intervenors, and upon consideration thereof and the decision and opinion of the Court filed herein, it is

ORDERED, ADJUDGED, DECREED AND DECLARED that peat moss is an agricultural commodity within the meaning, scope and intent of Section 203 (b) (6) of the Interstate Commerce Act (49 U. S. Code, 303 (b) (6)); and it is further

ORDERED, ADJUDGED AND DECREED that the report and order Division 1 of the Interstate Commerce Commission dated December 9, 1955, as affirmed by the report and order of the Interstate Commerce Commission of April 10, 1956, and the orders of the Interstate Commerce Commission entered on the 14th day of May 1956 with respect to the Carriers William Stokes and John A. Shaughnessy and with respect to the Carrier Anthony Russo on the 25th day of May 1956 and any other orders of the Interstate Commerce Commission in the proceedings before the Interstate Commerce Commission entitled

Docket Nos. MC 84805 Sub No. 2
MC 107585 Sub No. 3
MC 114223
MC 114224
MC 114225
MC 114226
MC 114234
MC 114236
MC 114283

Maine Trucking Co., Inc.
Frank DeVito d/b/a DeVito Warehousing & Trucking
Paul Michelsohn
John J. Michelsohn d/b/a Michelsohn Trucking Co.
Anthony Russo
William Stokes
Marvin Grifka d/b/a Holland Specialties
John A. Shaughnessy
Joseph Hammer d/b/a Hammer & Son

insofar as such order and orders find and conclude that Peat Moss is not embraced by the term "agricultural commodities" as that term is used in Section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303 (b) (6)), be and the same hereby are suspended, enjoined, annulled and set aside.

Dated: New York, N. Y., January 8, 1957.

THOMAS W. SWAN,
Circuit Judge.
LAWRENCE E. WALSH,
District Judge.
JOHN M. CASHIN,
District Judge.

Judgment entered January 21, 1957.

HERBERT A. CLARKSON,
Clerk.

JB.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. 1042

THE BALTIMORE & OHIO RAILROAD COMPANY, et al.,

Appellants,

v.

PREMIER PEAT MOSS CORPORATION, et al.,

Appellees

APPELLANT RAILROADS' STATEMENT OF JURISDICTION

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Filed: May 13, 1957.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad, Lehigh Valley Railroad Company, The New York Central System: The New York, New Haven & Hartford Railroad Company, The Pennsylvania Railroad Company and Reading Company,

Appellants,

v.

Premier Peat Moss Corporation, Gellico, Inc., Garden Supply Sales Corporation, Lewis International Company, New Amsterdam Import Co., Inc., Atkins & Burbrow Conn. Corp., Bruco Peat Moss Corporation, Ascot Peat Moss Corp., Conrad Fafard, Inc., Ezl. Dunwoody Co., L. H. Nester & Co., J. M. Trading Corp., Edmond J. Lang, National Distributors, Inc. and The Peat Moss Association, Inc.

Appellees

APPELLANT RAILROADS' STATEMENT OF JURISDICTION.

In compliance with Rule 13, Paragraph 2 of the Revised Rules of the Supreme Court of the United States, the Baltimore & Ohio Railroad Company, The Central

Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, the Erie Railroad, the Lehigh Valley Railroad Company, the New York Central System, The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, and the Reading Company, the Appellants here, and Intervening Defendants below, submit their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause.

OPINION AND JUDGMENT BELOW.

The opinion of the United States District Court for the Southern District of New York, which Court consisted of the Honorable Thomas W. Swan, Circuit Judge; the Honorable Lawrence E. Walsh, District Judge; and the Honorable John M. Cashin, District Judge, has not as yet been reported. A copy of this opinion is attached and marked Appendix A. The final order of the Court is attached and marked Appendix B.

JURISDICTION.

(1)

The proceedings below were instituted, pursuant to the requirements of 5 U. S. C. § 1009, 28 U. S. C. §§ 1336, 1398, 2321-2325, inc., and 49 U. S. C. § 305 (g) by the Appellees here, a group of peat moss producers and shippers, to review, set aside and enjoin certain orders of the Interstate Commerce Commission, holding that peat moss, a type of peat sometimes called moss peat, is not included within the term "agricultural commodities" as used in Section 203 (b)(6) of the Interstate Commerce Act, 49

U. S. C. § 303 (b)(6). The cause was heard by a District Court of three judges in accordance with the requirement of 28 U. S. C. § 2325.

(2)

The Court below, after hearing argument and receiving briefs of all parties, on January 8, 1957 issued an order suspending, enjoining, annulling, and setting aside orders of the Interstate Commerce Commission (hereinafter referred to as the Commission) issued by it in *Marino Trucking Co., Inc., Extension — Peat,* Docket MC-84805 (Sub No. 2) *et al.*, 66 M. C. C. 105 (1955). Those orders of the Commission were to the effect that peat moss, a commodity which is dug from the earth's sub soil, and which is neither planted, tilled, cultivated, nor harvested in the manner of farm crops, is not an agricultural commodity within the meaning of Section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. 303 (b)(6), and that, therefore, transportation of peat moss over the highways in interstate commerce by for-hire carriers requires either a certificate or a permit. The effect of the order of the Court below, reversing the order of the Commission is, that peat moss may be transported by for-hire motor carriers in interstate commerce throughout the nation, totally outside of the Commission's economic regulatory powers which have been created by Congress to insure the public of a national transportation system sufficient to provide economical, non-discriminatory and efficient service to the nation's shippers and at the same time be available to adequately provide for the nation's defense.

(3)

Jurisdiction of a direct appeal from the judgment of the three judge district court is vested in the Supreme Court by statute, 28 U. S. C. §§ 1253 and 2101, (b).

(4)

Such jurisdiction of the Supreme Court is also established by cases such as *United States* v. *B. & O. R. Co.*, 333 U. S. 169 (1948) and *I. C. C.* v. *Hoboken R. Co.*, 320 U. S. 368 (1943).

THE QUESTION RAISED ON APPEAL.

Whether the district court was in error in holding that peat moss, a commodity which is dug from the earth's sub soil, and which is neither planted, tilled, cultivated, nor harvested in the manner of farm crops is an agricultural commodity within the meaning of section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. 303 (b)(6) and that, therefore, transportation of peat moss over the highways in interstate commerce by for-hire carriers does not require either a certificate or a permit?

STATEMENT OF THE CASE.

This proceeding had its beginning in several applications filed by individuals and corporations for permits to engage in the transportation of peat moss as contract carriers by motor vehicle in interstate commerce within a substantial area surrounding New York City. These applications were protested by several motor carriers already certificated to transport peat moss within the involved area, and by the Appellant railroads, each of which provides transportation service for peat moss in the general area covered by the applications. At the hearing held before one of the Commission's hearing examiners, the applicants moved to dismiss the applications on the ground that the Commission was without authority to require certificates or permits for the transportation of peat moss by motor carrier since this item is an agri-

cultural commodity within the meaning of Section 203 (b)(6) of the Interstate Commerce Act, and therefore, its transportation is exempted from the scope of the Commission's economic regulatory powers including the requirement that carriers procure certificates or permits before engaging in interstate transportation. This motion was supported by the Secretary of Agriculture, and opposed by these Appellant railroads, and by the protesting motor carriers.

The Examiner took the motion under advisement, and then heard evidence pro and contra the need for the services proposed to be rendered by the several applicants. In his report the Examiner recommended that the Commission grant the motion to dismiss the applications on the ground that peat moss is an agricultural commodity. He further recommended that in the event the Commission did not grant the motion, it should approve the applications on the additional ground that the several applicants had successfully shown that the issuance of contract carrier permits would be consistent with the public interest, the statutory standard for issuing contract carrier permits. These Appellant railroads filed exceptions to the Examiner's recommendation that peat moss is an agricultural commodity.

Thereafter, Division 1 of the Commission, in a report and order entitled *Marino Trucking Co., Inc., Extension—Peat,* 66 M. C. C. 105 (1955) denied the motion to dismiss the applications holding that peat moss is not included within the exemption contained in Section 203 (b)(6) of the Act. However, the Division found as the Examiner did, that the issuance of the permits would be consistent with the public interest and ordered permits to be granted to the several applicants. Petitions for reconsideration of this order of Division 1 were filed, and thereafter denied by the Commission on April 10, 1956.

As of the present time, the several applicants have received their permits and are duly authorized to trans-

port peat moss as contract carriers throughout a substantial interstate radial area having New York City as its hub.

The action in the Court below to review the Commission's order and to annul it was limited solely to the question of the status of peat moss in connection with Section 203 (b)(6) of the Act. Significantly, the action was not brought by the applicant motor carriers, each of which is apparently well satisfied to function as a regulated contract carrier of peat moss, but rather by shippers and producers who sought to have peat moss declared an exempt commodity so that they could utilize motor carrier service on a non-regulated basis. Of equal significance is the fact that the Department of Agriculture after supporting the view before the Commission that peat moss is an agricultural commodity did not join the plaintiff shippers and producers of peat in the Court below. Apparently, the Department of Agriculture has acquiesced in the conclusion of the Commission, or at least deemed it inappropriate to further pursue the views expressed by it in the Commission proceedings. The suit below was defended by the Commission, the United States, and these Appellant railroads.

The Court below after holding that the plaintiff shippers and producers, although not parties in the Commission proceedings, had standing to maintain the action, further held, contrary to the ruling of the Commission, that peat moss is an agricultural commodity and therefore may be transported in interstate commerce by contract motor carriers without a permit duly issued by the Commission. It is from this holding of the Court below that the appeal of the railroads is taken. More specifically, the appeal is from the order of the three judge court enjoining the Commission from enforcing its order insofar as such order found and concluded that "Peat Moss is not embraced by the term agricultural commodities as that term is used in Section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. 303 (b)(6)."

THE SUBSTANTIALITY OF THE QUESTION.

Having in mind that the Commission's interpretations of the statute under which it functions and regulates the day-to-day activities of the nation's transportation industry, are entitled to great weight in the courts, and not to be set aside unless clearly erroneous,[1] the question the Appellants would have this Court consider upon the submission of briefs and oral arguments, is whether or not the Commission was clearly wrong in holding that peat moss is *not* an agricultural commodity. If it was not, the Court below reached the wrong conclusion and should, therefore, be reversed. To these Appellants, the Commission was obviously right in its conclusion unless the term "agricultural" as used in Section 203 (b)(6) of the Act is distorted or warped by giving it a meaning completely at odds with the normal understanding of the word. That the normal meaning of the terms used in Section 203 (b)(6) is to govern is beyond dispute, for this Court so indicated as recently as last year.[2]

Before briefly discussing the gravity of the error of the Court below from the standpoint of the legal principles involved, it would seem particularly appropriate in this pleading to demonstrate the importance of that Court's holding not only to these Appellants, but also the commerce of the nation upon which its prosperity and well being at all times so heavily depends. Since, as will be shown later, the decision here involved will likely transcend and go far beyond mere determination of whether peat moss—in a relative sense, a somewhat minor product of commerce—is to be handled under regulation or outside of it, this is a case of importance to the entire transportation industry.

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[1] See *American Trucking Assns.* v. *United States*, 344 U. S. 298, 310 (1953); *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672 (1947); See also *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 54 (1956).

[2] See *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 53 (1956).

It is axiomatic, and also logically and by sound economic reasoning true, that the backbone of the transportation system is the regulated family of carriers made up of the railroads subject to Part I of the Act, the certificated motor carriers subject to Part II of the Act, and the water carriers and freight forwarders subject respectively to Parts III and IV of the Act. If there be any doubt of this, it is resolved by Congressional mandate.[3]

So long as the carriers making up the national transportation system are under the regulatory powers of the Commission, the Congressional plan for insuring the nation of having available transportation facilities adequate to cope with the needs of commerce, the movement of the mails, and the ultimate safeguarding of the Republic can be successfully implemented and pursued subject only to the frailties of the agency entrusted with the administration of the plan, and those of the plan itself. Without denying the existence of such frailties, which in the one instance can only be remedied by the Congress and in the other, by the courts, it can be said objectively and without any fear of contradiction whatsoever that generally the plan has functioned well—exceedingly well. Proof of this if any is required is the superiority of the nation's transportation system, without equal anywhere in the world, and the universal high regard for the Commission.

If the exemption for agricultural commodities, as that term is used in Section 203 (b)(6) of the Act is improperly broadened by judicial decisions, or if a judicial decision has the effect of producing a precedent for extending or expanding the exemption beyond what was reasonably contemplated by Congress, the entire scheme and plan so fully detailed by the Congress and so carefully and forthrightly administered by the Commission for almost three-fourths of a century are of necessity thwarted and frus-

[3] The National Transportation Policy, preamble to the Interstate Commerce Act, 49 U. S. C. preceding §§ 1, 301, 901, 1001; See also *United States v. Pennsylvania Railroad Co.*, 323 U. S. 612, 616 (1945).

trated. This is so because the foundation of the plan is Commission regulation and supervision of for-hire carriage which, of course, cannot exist where a particular type of carriage is exempted. The product of exempting a segment of the entire industry while the rest of the industry remains under full regulation is widespread disturbance of very delicate inter-carrier competitive relationships with the ultimate result being a weakening and sapping of the regulated carriers.[4]

It is against the backdrop that the determination of the Court below should be viewed. The climate of judicial consideration is not limited to the relatively simple question of whether peat moss is an "agricultural commodity." Rather, because of the reasoning used by the Court below, it includes the broader aspects of whether Congress intended to remove from the comprehensive scheme of regulation deemed essential for the maintenance of a healthy and flourishing transportation system, the transportation by for-hire motor carriers of many substances coming from the earth's sub soil merely because they are organic in origin, despite the fact that they are neither sown nor planted by man; neither cultivated, tilled nor cared for by him; neither harvested or gathered in the manner of ordinary crops; nor produced, processed or developed by the methods or with the tools ordinarily used by farmers and those engaged in kindred pursuits such as dairying and animal husbandry. In considering this question in its broader aspects, particular attention must be given to eliminating the confusion that might be created by reference to earlier cases interpreting Section 203 (b)(6) of the Act. All of those cases were concerned with the status of commodities which, all would agree, were agricultural commodities, but which having been subjected to varying

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[4] See *American Trucking Assns.* v. *United States*, 344 U. S. 298, 312; (1953). See also the statements of the Federal Coordinator of Transportation, Hearings, Sub-Committee of the House Committee on Interstate and Foreign Commerce, H. R. 5262 and H. R. 6016, 74th Cong., 1st Sess. 24.

degrees of processing were claimed to be "manufactured products" and thus by the words of the statute outside of the exempt classification.[5] This case, unlike the other cases involving Section 203 (b)(6) is not concerned with the effect of processing on items admittedly agricultural commodities, but rather the determination of whether the item in its natural state as it comes from the earth's sub-soil is an agricultural commodity.

Since this Court has said that the terms of Section 203 (b)(6) are to be given their normal meaning,[6] it would be appropriate to ascertain the normal meaning of "agriculture." The following is the usual dictionary definition:[7]

> "The art or science of cultivating the ground and raising and harvesting crops, often including also feeding, breeding, and management of livestock; tillage; husbandry, farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent, the preparation of these products for man's use and other disposal by marketing or otherwise. In this broad use, it includes farming, horticulture, forestry, dairying, sugar making, etc."[8]

Since in this case, there is no dispute concerning the Commission's findings as to the physical characteristics and qualities of peat moss, those findings should be matched against the normal meaning of the word "agriculture" to determine whether those items are embraced in the term "agricultural commodities" as used in the statute. The Commission found as follows:

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[5] See *e.g.*, *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956).

[6] *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 53 (1956).

[7] Webster's New International Dictionary, p. 52 (1952 Ed.).

[8] The Commission has substantially adopted the dictionary definition in defining the term. See *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 519 (1951).

"Peat moss is composed of plants which were recently growing, or which grew many years ago, such as sphagnum moss, reeds, ferns, certain types of trees, other plants, or, in some cases, a mixture of these materials. This vegetation after being grown on the land, has ceased to live, and has undergone partial decomposition. Deposits are accumulated under water or in places waterlogged most of the time. Organic matter decomposes very slowly under water. Thus, the remains of vegetation growing in water, or falling into it, tend to accumulate more rapidly than they decompose, until the accumulation of deposits is exposed to the air at the surface. From then on decomposition of the organic matter keeps pace with its accumulation. As the level of the bog is raised new types of vegetation appear in response to the changing environment. At the site of a bog there usually is found on top various plants growing and living and sending their roots into the bog. When these plants die their seeds remain, and the dead plants enter into the process of decay, as did plants hundreds of years before them. When the dead matter is covered with water the decomposition is arrested. This process continues year after year for hundreds of years, and tends to build up a deposit of considerable depth. Therefore, at a bog there will be found living matter growing on top; immediately below, matter that was alive a short time ago; and at successively lower depths, matter which has been dead for longer and longer periods. If trees have formed a large portion of the deposit if is known as woody peat, while if the deposit is comprised chiefly of sphagnum moss the result is a very fine, soft sphagnum-type peat moss. The latter type is usually selected for the commercial trade, and is the type here under consideration. Peat moss is used primarily for soil improvement, as a fertilizer conditioner, as

bedding for horses and cattle, and as poultry litter. To a limited extent, it is also used for packing plants, cut flowers, and certain vegetables for shipments to market, and for other purposes. In 1950, for example, of approximately 256,000 tons produced in this country or imported, approximately 161,000 tons were used for soil improvement, 56,000 tons for fertilizer filler, 31,000 tons for poultry litter and stable bedding, and 8,000 tons for all other uses. All of the peat moss involved is imported principally from Germany, but to some extent from Canada.

"In harvesting peat moss, a usual preliminary step consists in draining at least the part of the bog selected for immediate use. Spade-like implements are used for cutting and removing peat moss in blocks. The blocks, often about 8 by 16 inches' surface measurement and cut at a depth of about 8 inches, are sometime placed in ricks, or stacks, to drain and to dry. A more rapid method of drying involves stacking the blocks on wooden frames. When handled in this way the blocks may be air dried in 2 or 3 weeks, while a whole season is often required for drying peat moss in ricks. After drying, the blocks are taken to a storage house, usually a shed-like structure, where they are shredded, baled, and made ready for shipment. The shredding devices are usually modifications of grain-threshing equipment. Pegs, which take the place of the concaves in a thresher, are set against springs to take care of lumps too hard for shredding. Sometimes roots and other coarse particles are removed during the shredding process. Very coarse sieves, perhaps of 3/8 inch mesh, may be used to separate the large pieces or aggregates not suitable for marketing. The peat moss is then compressed into bales approximately 7.5 cubic feet and 3.5 cubic feet in size. The larger size bales predominate in the shipments handled by applicants."

A relating of the qualities of peat moss above, with the normal meaning of the term agriculture, would seem to compel the conclusion that while peat moss may have agricultural uses, just as limestone, phosphate rock, plows, harrows and harvesters have, it is not an agricultural commodity, but rather a natural product of the earth's sub-soil. The paramount reason for this is that peat moss is not created by farmer culture, but rather by the wonderous processes of nature, functioning for hundreds or thousands of years totally without farmer assistance. Why, if this is so, did the Court below reach the opposite conclusion, namely that peat moss is an agricultural commodity? The explanation is best found, it is believed in the following language of the Court:

> "Indubitably peat moss is of a vegetable origin. It is 'produced by nature from what was once vegetation, and chemically it is substantially the same as the vegetation from whence it is derived.' In fact, its chief characteristic results from the fact that nature itself has arrested any substantial change which without the protection of water would otherwise have taken place. Its principal uses, too, are either agricultural or horticultural.' "[9]

A careful reading of the opinion of the Court below indicates that other than the fact that peat has agricultural uses, its vegetable nature is the only basis the Court had for independently concluding that it is an agricultural commodity. And, of course, the mere fact that this commodity is used by the farmer for agricultural purposes does not make it an agricultural commodity any more than innumerable pieces of farm equipment such as plows, harrows, rakes, harvesters and combines are agricultural commodities.

Since the review of the Court below under the decisions of this Court was, as pointed out before, for the

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[9] Appendix "A", at p. 35.

limited purpose of determining whether the Commission's interpretation of the statute was clearly wrong, the detailed discussion by the Court of the persuasiveness of the Commission's reasons for its interpretation is not the focal point of the inquiry here. Rather, the question here is whether the Court below had sound reasons for concluding that the Commission's interpretation of the statute was obviously wrong. A little careful thought will convince anyone, these Appellant railroads most respectfully submit, that the reason given by the Court below is totally insufficient to show clear error on the part of the Commission.

The sub soil of the earth, that portion of the earth's total mass which lies immediately below the extreme outer surface which supports living plants of innumerable kinds and varieties, is made up of both organic and inorganic material. Without going into an excessively complicated geological or geochemical discussion, all of these many substances below the tillable surface used for growing crops were created and exist in their natural state, totally independent of anything that any man living today, or in any of the known ages of man, does or has ever done. They are products of the fantastic and truly wonderous functions of nature, the pattern of which is generally believed to be directed by divine providence and nowhere believed to be the doing of man. The only concern man has with them is to extract them from their natural locale for use in various forms in his many endeavors. To think of any of these natural products which come from the earth's sub soil whether they be organic or inorganic as being commodities of "farmer culture" grossly overstates the role of man in their production.

Now, the Court below when confronted with the argument that the vegetable or organic origin of peat could not be relied upon to create for it the status of an agricultural commodity because many other of the products in the earth's sub soil are likewise of organic origin,

notably lignite, coal, phosphate, fossils, and amber, attempted to distinguish peat from the other organic natural substances by pointing out that coal for example is a mineral. In the language of the Court:

> "The defendants urge that peat moss is unlike any other commodity produced on a farm and is more in the nature of coal. But in the case of coal, although in origin derived from vegetation, the processes of nature have converted it into a mineral. *Not so in the case of peat moss.*" (Emphasis supplied.)[10]

In other words, the rationale of the Court's basic thinking was that the extent of the natural processing determines whether an organic substance admittedly dug from the earth's sub soil, is on the one hand an agricultural commodity, or on the other hand a mineral. These Appellants most respectfully ask, can this be regarded as an intelligent approach to the problem when the issue is whether the commodity is agricultural, that is, one brought to maturity by farmer care, tillage, or cultivation.

There are few subjects in the law that have created as much difficulty as the problem of what substances are included in the term "minerals", and it is evident that the difficulties in the legal field are not exclusive to it, but extend into geology and the other sciences involved with the makeup of the earth's crust. The dictionary defines "minerals" as:

> "Any chemical element or compound occurring naturally as the product of *inorganic* process * * * such substances as coal or amber are *not* minerals in the true sense."[11] (Emphasis supplied.)

From this definition it would appear that minerals consist of *inorganic* substances, and perhaps from a geochemical standpoint this is so, but normal usage, even

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[10] Appendix "A", at p. 35.

[11] Webster's New International Dictionary, p. 1563 (1952 Ed.).

amo..g scientists has extended to the word a broad and comprehensive meaning so that generally it is considered to also include organic substances from the earth's sub soil. Thus, Ladoo and Myers in their textbook say:

> "For convenience in classification the mineral kingdom may be divided in three cases: the fuels, the metals and the non-metals. The minerals included in each of these classes possess certain properties in common. The fuels are of organic origin and are used largely to produce energy through combustion, a market in which they are all competitive."[12]

The Courts, often confronted with the term "minerals" in construing statutes, deeds, and other legal documents, have generally concluded that included within the term are all substances in the sub soil, that is to say everything other than the mere surface used for growing crops and for supporting buildings and other structures. Perhaps the most cited expression to this effect is that of the great Baron Parke in the leading English case, the *Earl of Rosse* v. *Wainman,* where he said:

> "The term 'minerals' * * * in its proper sense includes all fossil bodies or matter dug out of mines."[13]

This Court in referring with approval to the definition of Baron Parke, in *Northern Pacific Railway* v. *Soderberg,* 188 U. S. 526 (1903), pointed out at page 543 that mineral deposits should be construed to include:

> "* * * all lands chiefly valuable for other than agricultural purposes, and particularly as including not-metallic substances, among which are held to be alum, asphaltum, borax, *guano,* diamonds, gypsum, *resin,* marble, mica, slate, amber, petroleum, lime-

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[12] Ladoo and Myers, Nonmetallic Minerals, p. 1 (2d ed. 1951).

[13] 14 M. & W. 859, 872, 153 Eng. Rep. 724, 730 (1845) aff. 2 Ex. 800, 154 Eng. Rep. 714 (1848).

stone, building stone and *coal.*" (Emphasis supplied to indicate substances which are clearly organic in nature.)

One of the best summaries of what are included in the term "minerals" is found in *Griffin* v. *Fellows,* 81½ Pa. 114, 124 (1883):

> "The term 'minerals' embraces everything not of the mere surface where it is used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils, are comprehended within it."

Indeed, in 1954 Congress, in revising the Income Tax Code, placed peat[14] in the mineral category when it added it to the list of products which entitled the producer to a depletion allowance. Section 613 (b)(5)(A) of the Internal Revenue Code of 1954[15] lists the products entitled to the 5 percent depletion allowance as follows:

> "(5) 5 percent
>
> (A) brick and tile clay, gravel, mollusk shells (including clam shells and oyster shells), *peat,* pumice, sand, scoria, shale, and stone, * * *." (Emphasis supplied.)

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[14] It should be borne in mind that peat moss is one of the types of peat and is not to be confused with the "mosses", such as Spanish moss, which grow on the surface of the earth. The Commission's findings on this subject indicate this, and there is no dispute as to the correctness of these findings. The Commission found: "* * * At the site of a bog there usually is found on top various plants growing and living and sending their roots into the bog. When these plants die, their seeds remain, and the dead plants enter into the process of decay, as did the plants hundreds of years before them. When the dead matter is covered with water, the decomposition is arrested. This process continues year after year for hundreds of years, and tends to build up a deposit of considerable depth. Therefore, at a bog there will be found living matter growing on top; immediately below, matter that was alive a short time ago; and at successively lower depths, matter which has been dead for longer and longer periods. *If trees have formed a large portion of the deposit, it is known as woody peat, while if the deposit is comprised chiefly of sphagnum moss the result is a very fine, soft sphagnum-type peat moss. This latter type is usually selected for the commercial trade, and is the type here under consideration.*" (Emphasis supplied.)

[15] 26 U. S. C. § 613 (b)(5)(A).

This recognition by Congress that peat is a mineral or at least naturally falls in the same class as minerals and other natural deposits found beneath the earth's surface is further strong and convincing evidence that the definition of peat as an agricultural commodity under section 203 (b)(6) of the Interstate Commerce Act is a distortion of Congressional intent.

These court and textbook authorities coupled with the recent extension of the depletion allowance for peat make it amply clear that the differentiation relied upon by the Court below to distinguish peat from other organic substances dug from the earth's sub soil, namely that such other organic items, for example coal, are minerals is actually not a differentation at all, because peat itself is a "mineral" when that term is given its broader non-technical meaning. Certainly if minerals include fossils, guano, amber, and in fact everything in the earth's crust except the bare surface used in growing crops and for supporting structures, peat which is dug from the sub soil and which does not in its natural state form a part of the tillable surface, is a mineral. Further evidence that peat should be classified as a mineral is the fact that the Minerals Yearbook published by the Department of the Interior, which contains statistical and other data relating to "Mineral Industries in the United States" and which is stated to "provide a convenient and reasonably comprehensive reference survey of United States mineral activity", includes information on peat and in its statistics on mineral production sets forth figures for peat.[16] Significant too is the fact that the figures relating to the production of peat, including peat moss, are reported to the Bureau of Mines.[17]

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[16] Minerals Yearbook, United States Department of the Interior—Bureau of Mines 1951, pp. 73, 931-934 inc. In the text the term peat is used to cover all forms of peat including the so-called peat moss. In fact, peat generally is thought to include peat moss.

[17] Minerals Yearbook, *supra*, 1951, p. 931.

But even in the absence of these authorities it would be extremely difficult to place peat in a different category from the many other organic substances dug or mined from the earth's sub soil. The Encyclopedia Britannica describes peat as follows:

"Peat, a product of decayed vegetation found in the form of bogs in many parts of the world."[18]

And the dictionary defines peat as follows:

"Any mass of semi carbonized vegetable tissue formed by partial decomposition in water of various plants, especially mosses of the genus *Sphagnum*."[19]

Compare this with a definition of coal:

"Coal is a black, or brownish-black, solid amorphous substance formed by partial decomposition of vast quantities of vegetable matter laid down in swamps and bogs millions of years ago. As a result of slow subsidence, the water level in these swamps remained high enough to keep most of this vegetable matter under water, or completely waterlogged. It usually remained low enough, however, to sustain a wealth of living vegetation, from tall trees to small ferns and other plants, which constantly added to the bulk of plant debris. The processes of decay were slow and very incomplete, as little oxygen could penetrate to this vegetable matter. Bacterial activity, for example, was limited to that of the rather small group of anerobic bacteria. Thus, peat formation was the ultimate result. The eventual thickness of the layer of peat depended upon the length of time elapsed before an increase in the rate of subsidence could cause gradual destruction of the swamp vegetation and consequent deposition of a layer of silt or other

[18] Encyclopedia Britannica, Vol. 17, p. 427 (1943 ed).

[19] Webster's New International Dictionary, p. 1800 (1952 ed.).

material. Uplift, of course, would tend to destroy the accumulated vegetable debris through the normal process of decay.

"Conditions contributing to the change of the material in the peat bog into coal are (1) exclusion of the oxygen in the air, which prevents complete oxidization of the vegetable matter; (2) pressure, which solidifies and compresses it; and, (3) heat, which partly vaporizes the volatile matter and expels moisture.

* * * * * *

"It is now generally accepted that all coals, regardless of rank or age, have a common origin in swampy areas of slow subsidence and that coal formation is a continuing process that runs through the various ranks, including peat, lignite, subbituminous, bituminous, and semianthracite to anthracite, in a related chain. The problem of how coal was formed from peat has not yet been solved completely."[20]

From this comparison it can be seen that the only real difference between peat and coal is the amount of natural processing to which each is subjected. But regardless of the fact that the several coals as contrasted with peat and lignite are of different ages and exposed to varying functions of the natural processes, they are of the same genus and both, while not true minerals in the hyper-technical sense are minerals within the meaning of that term as defined by the courts and the writers and workers in the field of geology. And from the standpoint of industrial classification, the digging and producing of peat, even though it, like limestone, guano and phosphate rock are used as soil improvers, is classified by the Department of Interior as a mineral

[20] Van Royen and Bowles, The Mineral Resources of the World, (1953 ed.), pp. 8, 9.

industry, the production figures of which are reported to the Bureau of Mines.

From a legal and practical standpoint, the production of peat is a mining type of operation rather than an agricultural pursuit. Peat is not present on the earth's surface, that portion of the outer crust which is regularly used for growing crops, but must be extracted from the sub soil. The Encyclopedia Americana states:

> "In the digging of peat for fuel the bog is partially drained by open ditches, and when the excess of water has disappeared the *loose surface is removed* and the rectangular 'turfs' are cut with specially constructed spades, * * *. The turfs or 'peats' are placed on end in little groups until dry when they are placed and stored under cover."[21] (Emphasis supplied.)

The description of the extraction operation is almost identical with the findings of the Commission which were concerned primarily with the digging of peat moss. However, this quotation is presented because it makes it clear that the surface of the bog is not peat, and that before the peat can be made available for extraction, the surface must be cleared away. At once, the similarity of this operation to strip mining becomes strikingly apparent.

When called upon to determine what is contemplated by "mining" the courts have adopted a definition which very clearly would include the extraction of peat. Typical of those court definitions is that found in *Chicago Mines Co.* v. *Commissioner of Internal Rev.*, 164 F. 2d 785 (10th Cir., 1948). At page 787, the court said:

> "'A 'mine' is an excavation in the earth from which minerals are removed by digging or other mining processes * * *. Mining thus connotes the removal of minerals from a natural deposit * * *".

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[21] Vol. 21, p. 480 (1946 ed.).

There no longer is any doubt that strip mining, a method of extracting substances from the earth's sub soil by direct digging after first removing the overburden or surface soil—as contrasted with shaft or deep pit mining—is included in the term "mining" when it is used in statutes or deeds. See *Buchanan* v. *Watson*, 290 S. W. 2d 40, 43 (Ky. 1956). Also open workings to extract substances from the sub soil are mining operations. See *Union Drainage Dist. No. 6* v. *Manteno Limestone Co.*, 341 Ill. App. 353, 360-61, 93 N. E. 2d 500, 503 (1950). If the operation is one involving the extraction of minerals by digging, it is a mining operation even though it may be carried on by farmers using farm equipment. *Hanna* v. *Warren*, 77 Ind. App. 1, 133 N. E. 9 (1921).

Since, with respect to the extraction of peat, regardless of whether the peat be of the moss or woody variety, the process includes the removal of the surface followed by the digging in the sub soil to procure a substance which the court decisions indicate is a mineral, it can be concluded under the authorities above referred to, and numerous other authorities of similar purport that the operation is a variety of mining. This being so, it is readily understandable why the peat production figures are reported to the Bureau of Mines, and why Congress has extended to this activity the depletion allowance that is afforded to other mining operations. And, for the same reasons, it is equally understandable why the Department of Agriculture in its official publication, Agricultural Statistics, at no place includes peat (in any form) as an agricultural product or commodity. In fact, the commodity peat is totally absent from the table of contents and the index of this publication, and it is significant that peat is not even mentioned in the very substantial list of agricultural imports.[22]

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[22] Agricultural Statistics, 1955, U. S. Dept. of Agriculture (1956 printing).

If it be assumed that Congress intended the words in section 203 (b)(6) of the Interstate Commerce Act to be given their normal meaning, which is the recent holding of this Court, how can it logically or reasonably be concluded that peat, a mineral dug from the earth's sub soil largely by commercial concerns which are regarded as mineral industries be thought to be a product of tillage or cultivation of the soil. Unless the normal meaning required by this Court to be given to the term "agricultural commodities" is a complete distortion of the ordinary dictionary meaning of the words, it taxes reason and logic to the breaking point to say that peat moss is an agricultural commodity.

The Court below makes much of the fact that the Commission has held that trees, wild hay, wild berries, are agricultural commodities, and therefore concludes that since these items are not cultivated by farmers, peat moss should be in the same classification as trees and other wild vegetation. While the status of such non-cultivated items is not here involved—and indeed there can be some doubt as to whether they are properly regarded as agricultural commodities—there are important reasons why the trees, wild hay and wild berries, etc., can quite properly be classified as agricultural commodities whereas peat moss should not. The wild growing vegetation is a product of the surface of the earth and has the habits and nature or ordinary crops in that it uses the soil in the same way as cultivated vegetation. In a sense, both the wild and cultivated crops occupy the same segment of the earth's mass which is the area of agriculture. Then too, and perhaps most important, the harvesting of trees and other wild growing vegetation are activities regularly and normally associated with farming. The digging of peat moss clearly is not. Furthermore, unlike peat, there is no basis for including trees and other wild living vegetation in the broad category of minerals.

What is the seriousness of the error of the Court below? While it can be simply stated namely that the Court has included as agricultural commodities a substance which if normal usage is to prevail is something entirely different, the impact of the Court's determination as a precedent is almost beyond measure and particularly so to these Appellant railroads. Mineral production provides an extremely important, if not the most important portion of the railroad industry's traffic, and a large part of the mineral production handled by the railroads is organic or vegetable in origin. Examples of such traffic in addition to peat includes lignite, bituminous coal, anthracite coal and phosphate rock. Each of these as defined by court and textbook authorities are minerals, distinguished one from the other principally by the varying exposure of organic matter from which they originate to the functioning of forces at work in the earth's sub soil. The elimination of regulation for such items of commerce when handled by motor carriers would cause such widespread disturbances in the present inter-carrier competitive relationships that it would be modest indeed to say that the entire future of the railroad industry would be gravely endangered. Yet this is the direction the opinion of the Court below is taking.

In addition to the disastrous impact that the opinion of the Court below might have on the transportation industry, it could also have equally severe effects in the field of land law. If the Court below is right that peat is an agricultural commodity because it is vegetable in origin, then other organic substances dug from the sub soil likewise could be so classified. Since it is inconceivable that a product could be an agricultural commodity, and at the same time be a mineral, the vast amount of law dealing with mineral rights and mineral deeds, would be subject to disruptions, disorder, and uncertainty. Nothing could be more unwelcome in this area of law where certainty above all is most desired.

A further serious consequence that the opinion of the Court below could have is that it could result in depriving peat moss producers, some of whom may not be parties to this proceeding, of their depletion allowance under the 1954 Revenue Code. As indicated above, peat moss has always been considered one type of peat. However, a decision declaring it to be an agricultural commodity would tend to place it outside of the depletion allowance, since the Congressional scheme in that area is to include only those products which come from the subsurface of the earth and which are not readily regenerative.[23]

CONCLUSION.

The Appellant railroads most respectfully submit that this Court has jurisdiction to review this decision by direct appeal from the District Court under the statutory provisions and cases cited above. For reasons more fully set forth above these Appellant railroads further most respectfully submit that the issue presented is of the requisite substantiality to warrant and justify decision by this Court.

The primary question in this case is whether peat moss is an agricultural commodity as that term is used in Section 203 (b)(6) of the Interstate Commerce Act. The decision of the Court below involving this question which

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[23] For example in defining all other minerals in § 613 (b)(6) of the Internal Revenue Code of 1954 Congress specifically excluded "soil, sod, dirt, turf, water, or mosses. * * *" In fact about the only commodity included, that is a product of the earth's surface is timber, and the reason for this distinction is obvious in that timber, like the other products included in the allowance, takes many years to reproduce itself. A decision that peat moss is agricultural could lead to great confusion as to whether or not it is one of the "mosses" which are excluded, or whether it is to be considered a type of peat which is included. Historically the latter has been the case, and the entire Congressional plan for depletion allowances would seem to indicate that this should continue to be true.

these Appellants are asking this Court to consider and reverse is one which will have a serious and extremely detrimental impact upon the entire transportation industry and which as a precedent will have a disturbing and confusing effect upon land law in the various states and upon the application of the depletion allowance in determining the amount of federal income tax properly payable by peat producers.

For these reasons, which are more fully detailed and discussed above, these Appellant railroads ask this Court to note probable jurisdiction and to take such action in the premises as may be appropriate.

Respectfully submitted,

PAUL R. DUKE,
CARL HELMETAG, JR.,
Counsel for Appellant
Railroads.

CERTIFICATE OF SERVICE.

Dated May 13, 1957.

I, Carl Helmetag, Jr., attorney for the Appellant railroads, and a member of the Bar of this Court, hereby certify that I have mailed copies of this Jurisdictional Statement first-class mail, postage prepaid, to the following:

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APPENDIX "A".

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Premier Peat Moss Corporation, et al.,
Plaintiffs,
v.
United States of America and Interstate Commerce Commission,
Defendants.

Opinion U. S. District Court
Filed Nov. 8-1956
S. D. of N. Y.
Civil Action
No. 110-131
November 8, 1956

Suit by peat moss producers and shippers, brought under 28 U. S. C. A. §§ 1336, 1398, 2284 and 2321-2325, to review, set aside and enjoin certain orders of the Interstate Commerce Commission holding that peat moss is not an agricultural commodity within the meaning of 49 U. S. C. A. § 303(b)(6).

MITCHELL SALEM FISHER, Attorney for Plaintiffs.

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JAMES E. KILDAY and JAMES H. DURKIN, Attorneys, Department of Justice,
PAUL W. WILLIAMS, United States Attorney,
ROBERT W. GINNANE, Gen. Counsel, and
LEO H. POU, Associate Gen. Counsel, Interstate Commerce Commission, for Defendants.

BERNARD SOBOL, ROBERT S. TRIGG and CARL HELMETAG, JR., Attorneys for Intervenor Railroads.

Before: SWAN, Circuit Judge, and WALSH and CASHIN, District Judges.

SWAN, Circuit Judge.

This action is the sequel to proceedings before the Interstate Commerce Commission initiated in 1953 by ap-

plications of motor carriers, pursuant to 49 U. S. C. A. § 309, for permits to transport as contract carriers peat moss, ground or not ground, from New York and New Jersey piers in New York Harbor to points in New York, New Jersey and Connecticut within 150 miles of New York City. The applicants moved for dismissal of their own applications on the ground that peat moss is an agricultural commodity and therefore the transportation of it by contract carriers in interstate commerce is exempted from the permit requirements of § 309 by § 303(b)(6);[1] they sought permits only in the event of rejection of this contention. The motion was supported by the Secretary of Agriculture, who filed a brief without formally intervening, and by intervening producers and shippers of peat moss, including plaintiffs in the present action. Several Railroads intervened and opposed the motion. The Examiner who heard the case took evidence as to the nature of peat moss, its use, the manner of harvesting it, and the need of shippers for motor carrier transportation. His Report recommended that the Commission should find that peat moss is an agricultural commodity and should dismiss the applications for lack of jurisdiction. Division 1 of the Commission accepted the Examiner's findings of fact but ruled that peat moss is not an agricultural commodity within the statutory exemption, and that the applicants were entitled to permits as motor contract carriers. *Marino Trucking Co., Inc., Extension—Peat*, 66 M. C. C. 105. Petitions for reconsideration were denied by the Commission on April 10, 1956, and the present suit was filed on June 1st praying that the orders of the Commission be set aside in so far as they conclude that peat moss is not an "agricultural" commodity within the meaning of the statute.

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[1] 49 U. S. C. A. § 303(b) declares "Nothing in this chapter * * * shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof) * * *."

There is no dispute between the parties as to the facts. The merits of the controversy are whether the Commission was correct in ruling that peat moss is not an "agricultural" commodity within 49 U. S. C. A. § 303 (b)(6). But before reaching the merits it is necessary to consider the contention of the defendants and the intervening Railroads that the plaintiffs have no standing to maintain the present suit.

To attack an order of the Commission a plaintiff must show that he has "a legal right or interest which will be injuriously affected by the order."[2] The defendants, whose argument the Railroads also adopt, contend that the orders here involved do not affect any right of the plaintiffs because they do not require the plaintiffs to do or to refrain from doing anything; that all the plaintiffs allege by way of injury is that they will have to pay more for transportation of peat moss by regulated motor carriers than they did before the Commission ruled that peat moss was not an agricultural commodity, which is merely saying that the orders will have an adverse effect on the plaintiffs' economic position; and that this is not enough to give plaintiffs standing to attack the orders, since "They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination."[3] We accept the legal propositions enunciated by the cited authorities, but they do not dispose of the case at bar. Here the question determinative of the shippers' standing to maintain the suit is whether or not the Commission has jurisdiction over motor carriers of peat moss. If it does, such carriers are required to establish and observe reasonable minimum rates and charges for the services rendered, and are prohibited from collecting less than the established minimum rates.[4] Hence the right of shippers to contract for transportation of peat moss is restricted to those motor carriers

[2] *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119.
[3] *Sprunt & Son* v. *United States*, 281 U. S. 249, 255.
[4] 49 U. S. C. A. § 318(a).

to whom permits are or may be issued, and the minimum rates payable are fixed by their filed schedules of rates. On the other hand, if the Commission does not have jurisdiction, the plaintiffs are free to get the best bargain they can from a motor carrier. For simplicity of discussion assume that the Commission should make a perfectly arbitrary ruling that tomatoes are not an "agricultural" commodity. Such a plainly erroneous determination would deprive a tomato farmer of the benefits Congress intended to confer by § 303(b)(6), namely, those flowing from freedom to use unregulated motor carriers.[5] It would thus deprive him of a statutory right and would restrict his common law right to contract for transportation on any terms acceptable to the carriers. The plaintiffs have similar rights which the orders injuriously affect, if the Commission erred in excluding peat moss from the "agricultural" exemption. This is plainly stated in *Frozen Food Express* v. *United States*, 351 U. S. 40. There the plaintiff was a motor carrier transporting numerous commodities which the Commission ruled were non-exempt but which the carrier claimed were agricultural commodities. In holding that the complaint presented justifiable issues, the opinion states (pp. 43-44):

> "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'order' of the Commission is in substance a 'declaratory' one, see 60 Stat. 240, 5 U. S. C. § 1004(d), which touches

[5] See *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U. S. 49, 51: "The exemption of motor vehicles carrying 'agricultural (including horticultural) commodities (not including manufactured products thereof)' was designed to preserve for the farmers the advantage of low-cost motor transportation."

vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done."

In *Consolidated Truck Service, Inc.* v. *United States*, D. C. N. J., decided September 28, 1956, Judge Biggs' opinion contains a dictum with respect to the rights of shippers, as follows: "If Consolidated does transport them (shelled nuts) it and its shippers will incur the penalties prescribed by the statute, the Commission having prohibited the transportation."[6] This is a further indication of the substantial interest which shippers have in the situation. In our opinion the plaintiffs have standing to maintain the suit.

On the merits we think the Commission was wrong. Whether the statutory exemption should be construed to cover a product of nature having such physical characteristics as peat moss is a question on which the Commission's determination, although entitled to deference, does not conclude the courts.[7]

The Commission made the following findings:

"Peat moss is composed of plants which were recently growing, or which grew many years ago, such as sphagnum moss, reeds, ferns, certain types of trees, other plants, or, in some cases, a mixture of these materials. This vegetation after being grown on the land, has ceased to live, and has undergone partial decomposition. Deposits are accumulated under water or in places waterlogged most of the time. Organic matter decomposes very slowly under water. * * * Therefore, at a bog there will be found living matter growing on top; immediately below, matter that was alive a short time ago; and at successively lower depths, matter which has been dead for longer and longer periods. If trees have formed a large

[6] See 49 U. S. C. A. § 322(c).

[7] See *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 54.

portion of the deposit it is known as woody peat, while if the deposit is comprised chiefly of sphagnum moss the result is a very fine sphagnum-type peat moss. The latter type is usually selected for the commercial trade, and is the type here under consideration. * * *

"In harvesting peat moss, a usual preliminary step consists in draining at least the part of the bog selected for immediate use. Spade-like implements are used for cutting and removing peat moss in blocks. The blocks, often about 8 x 16 inches' surface measurement and cut at a depth of about 8 inches, are sometimes placed in ricks, or stacks, to drain and to dry. A more rapid method of drying involves stacking the blocks on wooden frames. When handled in this way the blocks may be air dried in 2 or 3 weeks, while a whole season is often required for drying peat moss in ricks. After drying, the blocks are taken to a storage house, usually a shed-like structure, where they are shredded, baled, and made ready for shipment. The shredding devices are usually modifications of grain-threshing equipment. * * *"

The reasons advanced by the Commission for rejecting the Examiner's recommendation that peat moss be held to be an agricultural commodity are stated in a single paragraph of its opinion.[8] They are three: (1) that in an earlier decision the Commission had set forth a definition of "agricultural commodities" which Congress may be considered to have otherwise approved by implication when it adopted the 1952 amendment to include "(horticultural)";[9] (2) that peat moss is not within the

[8] 66 M. C. C. 105, 109.

[9] In the earlier decision, Determination of Agricultural Commodities, 52 M. C. C. 511, 519, the Commission concluded that the term agricultural commodities as used in the section "embraces 'all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey)'."

earlier definition since it is not produced on a farm by tillage and cultivation of the soil; and (3) that it is not a crop which once having commenced growth in the earth, air or water, can be harvested within any period capable of reasonable forecast by living man.

None of these reasons do we find persuasive. The earlier decision made no mention of peat moss. Nor did its definition of agricultural commodities purport to be all inclusive. It merely lists commodities which it "embraces"; hence there is no implication that all not listed were excluded from the definition. Consequently the suggestion that Congress may be considered to have approved the definition can carry no implication that Congress approved a holding that peat moss was a non-exempt commodity. Moreover, the rationale is contra to *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, where a commodity which had been denominated as non-agricultural in the "Determination" case because it was a manufactured product, was held by the Supreme Court to be within the exemption.

The argument that peat moss is not within the definition because it is not produced by cultivation of the soil is likewise unpersuasive. In the earlier decision the Commission itself recognized as within the exemption numerous commodities which are not the result of tillage and cultivation; for example, forest products, wild berries, marsh hay, prairie grass, and Spanish moss.

The third reason advanced, namely, that peat moss is not a crop which can be harvested within any period of reasonable forecast is insufficient to distinguish it from other wild products which are admittedly "agricultural"; for example, long-lived, slow growing trees. Furthermore, there is testimony in the record that under certain conditions peat moss may be ready to harvest within fifteen or twenty years. It is harvested in the summer season, dried in the sun and then processed by cutting and baling. Neither the report of the Commission nor the report of

the Examiner contains any finding as to the extent to which peat moss comes from farms. But the record shows it is dug both on land of farmers within the United States and on land of commercial peat moss companies. In some instances, farmers dig it themselves and bring loads of it to a peat moss company plant; in other instances, they may sell it in the ground and it is harvested by personnel of the company. If the essential nature of a commodity is "agricultural", it is irrelevant that at times it is harvested by commercial interests rather than the farmer himself, or that, as in the case at bar, the commodity is imported.

Indubitably peat moss is of vegetable origin. It is "produced by nature from what was once vegetation, and chemically it is substantially the same as the vegetation from whence it is derived. In fact, its chief characteristic results from the fact that nature itself has arrested any substantial change which without the protection of water would otherwise have taken place. Its principal uses, too, are either agricultural or horticultural."[10]

The defendants urge that peat moss is unlike any commodity produced on a farm and is more in the nature of coal. But in the case of coal, although in origin derived from vegetation, the processes of nature have converted it into a mineral. Not so in the case of peat moss. There the processes of decay have not progressed far enough to cause any substantial change in its original chemical content.

All of the witnesses with expert qualifications, several of whom had also had farm experience, testified that peat moss is commonly regarded as an agricultural commodity. Under the circumstances above recited and in the absence of any evidence in the record which suggests that peat moss may properly be classified in some non-agricultural category, we can see no rational basis for disregarding the uniformity of expert opinion. We think the Com-

10. Quoted from the Examiner's report.

mission exceeded the limits placed upon its statutory powers in excluding the interstate transportation of peat moss from the exemption provided by § 303(b)(6).[11] Accordingly, the orders under review must be set aside and an injunction against their enforcement will be granted.

If findings of fact and conclusions of law, supplementing those contained herein, are desired, the parties may submit proposals therefor within 15 days.

s/ THOMAS W. SWAN,
Circuit Judge.

s/ LAWRENCE E. WALSH,
District Judge.

s/ JOHN M. CASHIN,
District Judge.

[11] See *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49, 54.

APPENDIX "B".

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Premier Peat Moss Corporation, Gellico, Inc., Garden Supply Sales Corporation, Lewis International Company, New Amsterdam Import Co. Inc., Atkins & Durbrow Conn. Corp., Bruco Peat Moss Corporation, Ascot Peat Moss Corp., Conrad Fafard, Inc., Ezl. Dunwoody Co., I. H. Nester & Co., J. M. Trading Corp., Edmond J. Lang, National Distributors, Inc. and The Peat Moss Association, Inc.,

Plaintiffs,

against

United States of America and the Interstate Commerce Commission,

Defendants,

The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad, New York Central System, The New York, New Haven & Hartford Railroad Company, The Pennsylvania Railroad Company and Reading Company,

Intervenors.

Civil Action No. 110-131 DECREE

Before Thomas W. Swan, Circuit Judge, Lawrence E. Walsh, District Judge and John M. Cashin, District Judge, being the statutory three-Judge Court convened herein pursuant to the provisions of Title 28, Section 2284 of the United States Code.

This cause came on to be heard on the 3rd day of October, 1956, at the U. S. Court House for the Southern District of New York, Foley Square, Borough of Manhattan, City and State of New York, and was argued by counsel for the plaintiffs, counsel for the defendants, and counsel for the intervenors, and upon consideration thereof and the decision and opinion of the Court filed herein, it is

ORDERED, ADJUDGED, DECREED and DECLARED that peat moss is an agricultural commodity within the meaning, scope and intent of Section 203(b) (6) of the Interstate Commerce Act (49 U. S. Code, 303(b)(6)); and it is further

ORDERED, ADJUDGED AND DECREED that the report and order of Division 1 of the Interstate Commerce Commission dated December 9, 1955, as affirmed by the report and order of the Interstate Commerce Commission of April 10, 1956, and the orders of the Interstate Commerce Commission entered on the 14th day of May, 1956 with respect to the Carriers William Stokes and John A. Shaughnessy and with respect to the Carrier Anthony Russo on the 25th day of May, 1956 and any other orders of the Interstate Commerce Commission in the proceedings before the Interstate Commerce Commission entitled

"Docket Nos. MC 84805 Sub No. 2
MC 107585 Sub No. 3
MC 114223
MC 114224
MC 114225
MC 114226
MC 114234
MC 114236
MC 114283
Marine Trucking Co., Inc.

Frank DeVito b/b/a DeVito Warehousing & Trucking
Paul Michelsohn
John J. Michelsohn d/b/a Michelsohn Trucking Co.
Anthony Russo
William Stokes
Marvin Grifka d/b/a Holland Specialties Co.
John A. Shaughnessy
Joseph Hammer d/b/a Hammer & Son"

insofar as such order and orders find and conclude that Peat Moss is not embraced by the term "agricultural commodities" as that term is used in section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. 303(b)(6)), be and the same hereby are suspended, enjoined, annulled and set aside.

Dated: New York, N. Y., January 8, 1957.

THOMAS W. SWAN,
Circuit Judge.
LAWRENCE E. WALSH,
District Judge.
JOHN M. CASHIN,
District Judge.

Judgment entered January 21, 1957.

s/ HERBERT A. CHARLSON,
Clerk.